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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

KINUKO JORGENSEN, **Plaintiff and Appellant,** **v.** **FIRE INSURANCE EXCHANGE & JEFFREY S. LEE,** **Defendants and Respondents.**	**A100047** **(San Francisco County Super. Ct. No. 324958)**

Plaintiff/appellant Kinuko Jorgensen appeals a summary judgment in favor of defendants/respondents Fire Insurance Exchange (Fire Exchange) and its agent Jeffrey S. Lee (Lee) on her action for negligence. Appellant contends triable issues of fact exist as to whether Lee failed to procure the necessary and appropriate insurance policy for her rental property.[1] Her action arose out of Fire Exchange's refusal to defend and indemnify her against a wrongful eviction lawsuit brought by her former tenant.

BACKGROUND

Respondent Lee opened the Jeffrey S. Lee Insurance Agency in 1979. In 1980, appellant and her late husband, Harry Jorgensen, bought a "Standard Form Dwelling Fire Insurance Policy" from Lee for a rental duplex they owned at 3530 22nd Street, San Francisco. The policy, commonly referred to as a DP3 policy, provided coverage for

[1] The policies at issue in this case bear the Farmers Insurance Group logo on their first page, but respondent Fire Insurance Exchange was the entity that actually issued them.

damage to the building and to personal property within it, and for loss of fair rental value as a result of such damage.

At the same time the Jorgensens bought a "Special Form Homeowners" policy for their residence at 3536 22nd Street, San Francisco. The homeowner policy contained an endorsement entitled "Additional Premises Rented to Others" which extended coverage for personal liability for accidental bodily injuries and attendant medical payments to their rental duplex.

Both policies were in effect at all times relevant to the instant lawsuit.

At some unidentified date before 1992 the Jorgensens bought a special form homeowner policy from Lee for 1942 Alemany Boulevard, San Francisco, a house they owned and Harry Jorgensen's mother occupied. They also purchased their automobile insurance through Lee's agency.

Lee actively managed the Jorgensens' account until about 1986. Thereafter it was handled by his employees. Joanna Rubenchek, a Lee employee between 1991 and 1998, shared responsibilities for the Jorgensens' account with another employee, Julie Chu.

In the late 1980s Fire Exchange developed a policy entitled, "Landlords Protector Package." Lee understood that it provided coverage for wrongful evictions and a defense to landlords sued by a tenant. If an individual came to his office seeking coverage for rental properties, he would recommend the landlords protector package because it had broader coverage than the DP3 policy. He thought it was a substantially better policy for landlords than the DP3 policy, although its premiums were more expensive. Rubenchek also understood the landlords protector package to cover landlords for wrongful eviction actions.

On or about March 30, 1992, the Jorgensens converted the homeowner policy for the Alemany Boulevard house to a landlords protector package because Harry Jorgensen's mother had died and the house was now rented. Such a conversion would

not have occurred without the insured's request. Julie Chu arranged the conversion.[2] Neither Lee nor Rubenchek participated in the conversion or were aware of it at the time. The 22nd Street duplex would have been eligible for the landlords protector package in 1992.

From 1980 until his death in February 1996, Harry Jorgensen, not appellant, dealt with the Lee agency in matters concerning the Jorgensens' policies. During these years Lee occasionally recommended raising the liability limits on the policies or buying an umbrella policy. Rubenchek also discussed and quoted the price of an umbrella policy with Harry Jorgensen several times because she thought the Jorgensens needed better protection for all their assets. Harry Jorgensen continually rejected their recommendations, telling Rubenchek he did not want to pay any additional premiums. He impressed Lee and Rubenchek as a person who did not like to spend any more money than necessary.

Neither Lee nor Rubenchek disscussed the 1992 conversion of the Alemany Boulevard house policy from homeowner to landlords protector package with each other, with Julie Chu, or with Harry Jorgensen. They did not discuss the landlords protector package with Jorgensen in conjunction with the 22nd Street duplex. Rubenchek did not do so because, based on her previous conversations with him, she believed Jorgensen would not agree to pay the increased premium for it.

The Jorgensens never specifically requested Rubenchek to obtain coverage for wrongful eviction or "any claim relating to rental property." Rubenchek arranged conversions to the landlords protector policy for other clients of the Lee agency.

In September 1998, appellant evicted Steven Seidman, her tenant in the 22nd Street duplex. On May 4, 2000, Seidman brought an action against appellant for wrongful eviction (the Seidman action), alleging violation of the San Francisco Rent Stabilization and Arbitration Ordinance, negligence and fraud. He alleged that the

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[2] Julie Chu's whereabouts are unknown. Respondents' attorney declared that she has tried to contact Chu and was informed by Chu's last known employer that she may be out of the country.

eviction caused him to suffer inconvenience, annoyance and emotional distress and sought general, special and punitive damages.

Appellant tendered defense of the Seidman action to Fire Exchange. There is no evidence that between Harry Jorgensen's death and her tender of the Seidman action she inquired about the scope of coverage on the duplex or requested a change in the two policies covering it. Fire Exchange denied a defense under these two policies because they excluded coverage for damages resulting from intentional acts and from loss of a property right.

Appellant then brought an action against respondents for breach of contract, breach of the implied covenant of good faith and fair dealing, negligence and indemnity. Only the negligence causes of action are the subject of this appeal.

As to Lee, appellant's cause of action for negligence alleged: Since 1980 he has acted as her insurance broker and handled all her real property liability insurance needs. He intended that she rely on his professional expertise, and she did so. When she and her late husband procured the policies, she informed Lee that the duplex was used primarily as rental income property, and she required a business protection plan to provide adequate insurance for tenant lawsuits. Lee knew or should have known that the duplex was subject to the San Francisco Rent Ordinance. She repeatedly requested that he provide her the optimum protection for the premises and the business conducted thereon. Lee informed her that the policies issued by Fire Exchange either singly or collectively insured her against tenant lawsuits arising out of the premises and the residential tenancies. As a result of his negligence in failing to procure the appropriate and necessary policies for her, she was forced to defend the Seidman action herself, incurring attorney fees currently in excess of $37,000.

As to Fire Exchange, appellant's cause of action for negligence was brought on a respondeat superior theory, i.e., Fire Exchange was vicariously liable for the negligence of its agent, Lee, because it directed and/or authorized him to perform the previously described tortuous acts.

Respondents moved for summary judgment on the ground appellant could not state a cause of action for negligence based on their failure to procure adequate insurance coverage for the duplex. They asserted that an insurer has no duty to advise its insured about the availability of additional or extended coverage. They also contended there was no evidence appellant had ever inquired about such coverage or that, prior to Seidman's eviction, Lee had represented that she had such coverage.

A judgment of dismissal was entered after the court granted respondents' motion.

DISCUSSION

Standard of Review

Summary judgment is properly granted where there is no triable issue of any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must negate a necessary element of each of the plaintiff's causes of action or establish a complete defense thereto. (Code Civ. Proc., 437c, subd. (n)); *McManis v. San Diego Postal Credit Union* (1998) 61 Cal.App.4th 547, 555.) Once the defendant makes such a prima facie showing, the burden shifts to the plaintiff to show that a triable issue of material fact exists within the framework of the issues as fixed by the pleadings. (Code Civ. Proc., § 437c, subd. (*o*)(2); *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 122 (*Lowe*).)

Insurer's Duty

The essence of appellant's contention on appeal is that Lee had a duty to inform her that Fire Exchange had a policy available that would provide coverage on the 22nd Street duplex for wrongful evictions. Whether a duty of care exists is a question of law for the court. (*Wilson v. All Service Ins. Corp*. (1979) 91 Cal.App.3d 793, 796.)

Although insurance agents have a general duty to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured, that duty does not include the obligation to procure a policy affording the client complete liability protection. (*Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 922, 927 (*Fitzpatrick*).) Ordinarily, they have no duty to volunteer to an insured that the insured should procure

additional or different insurance coverage. (*Ibid*.) The latter rule changes only when (a) the agent misrepresents the nature, extent or scope of the insurance being offered; (b) the insured inquires or requests a particular type or extent of coverage; or (c) the agent assumes a duty beyond his general duty either by express agreement or by holding himself out as having expertise in a given field of insurance being sought by the insured. (*Id*. at p. 927.)

As an example of an agent assuming an additional duty by holding himself out as having special expertise, *Fitzpatrick* cites *Kurtz, Richards, Wilson & Co. v. Insurance Communicators Marketing Corp*. (1993) 12 Cal.App.4th 1249 (*Kurtz*). (*Fitzpatrick*, *supra*, 57 Cal.App.4th at pp. 925-926.) *Kurtz* overruled a demurrer sustained without leave to amend where the facts, if true, could establish that the broker, while negotiating group medical insurance with the insured, held himself out as an expert on the federal Tax Equity and Fiscal Responsibility Act, which has provisions affecting the relationship of private group medical insurance plans and Medicare. (*Kurtz*, at p. 1257.)

Appellant appears to concede that respondents made a prima facie showing that they are entitled to summary judgment. Instead, she argues that her evidence raises triable issues of fact concerning the applicability of the three *Fitzpatrick* exceptions to the rule that insurance agents do not generally have a duty to volunteer advice about procuring additional coverage.

As evidence of exception (a), misrepresentation regarding the scope of coverage, appellant cites her declaration in opposition to respondents' motion for summary judgment wherein she stated that she "was told" when she reported the Seidman action to Lee's office in July 2002 that her policy would cover it. Misrepresentation is gauged by the representations made when the insured is contemplating the purchase of insurance. (*Fitzpatrick, supra*, 57 Cal.App.4th at pp. 926-927 & citations therein.) Appellant's statement does not demonstrate any misrepresentation by Lee or his associates regarding the scope of the policies applicable to the 22nd Street duplex when the Jorgensens purchased or renewed them.

In support of exception (b)--request or inquiry by the insured--appellant relies on the Jorgensens' 1992 conversion of their Alemany Boulevard house policy from a homeowners policy to a landlords protector package.

On motions for summary judgment, courts consider all inferences reasonably deducible from the evidence and may grant summary judgment if there is no conflict with other inferences or evidence that raises a triable issue as to any material fact. (Code Civ. Proc., § 437(c); *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 352.) The 1992 conversion of the Alemany Boulevard house policy necessarily implies that the Jorgensens inquired about the appropriate insurance for the house since it was no longer family-occupied and were informed about the landlords protector package. The reasonable inference is that they were also informed about the specific coverages provided by the landlords protector package and were told, or were free to ask, how the package differed from the policy already covering their other rental property, i.e, the 22nd Street duplex. Their decision to convert to the landlords protector package for the Alemany Boulevard house additionally implies that, even though aware that the landlords protector package was available for rental properties, they chose not to convert their existing policy for the 22nd Street duplex to it. Appellant presented no evidence to contradict these inferences. Therefore, there is no triable issue of fact as to exception (b).

As evidence of exception (c), additional duty of insurer by holding oneself out as having expertise in the type of insurance sought by the insured, appellant asserts that Lee "held out" his associate Joanna Rubenchek as a specialist in personal lines of insurance.

Appellant bases her assertion on Lee's deposition testimony where he was asked (1) if Rubenchek was "a specialist in personal lines of insurance" in 1992, and (2) if one of her responsibilities as such a specialist was working with clients in obtaining homeowner policies, and he replied "yes" to both questions. However, as *Fitzpatrick, supra*, 57 Cal.App.4th at pages 925, 929 and *Kurtz, supra*, 12 Cal.App.4th at page 1255, make clear, "expert" for purposes of *Fitzpatrick's* exception (c), refers to expertise in an arcane or particularly complicated or sophisticated field of insurance, e.g., the effect of the Medicare provisions of a federal statute on large group health insurance programs.

There is no evidence that Rubenchek handled anything other than straightforward, garden variety kinds of policies needed by lay people to protect their ordinary personal assets like cars, houses, or small residential rentals. There was also no evidence that the Jorgensens ever sought anything except basic protection for their assets. There is no evidence they specified a need for protection against tenant lawsuits. Nor can a reasonable inference be drawn from Lee's statement that Rubenchek had particular expertise in tenant actions against landlords or that Lee ever communicated to the Jorgensens that she did. Absent other evidence, Lee's deposition statement implies, at most, that he was distinguishing Rubenchek as an employee who handled insurance for individuals from employees who managed corporate insurance accounts.

Without evidence of one of the exceptions to the rule that an insurance agent does not have a duty to recommend the purchase of additional or different insurance coverage to an insured, appellant cannot show that respondents had a duty to procure them insurance for tenant actions. Consequently, respondents are entitled to summary judgment on appellant's cause of action for negligence.

DISPOSITION

The judgment of dismissal is affirmed.

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Jones, P.J.

We concur:

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Stevens, J.

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Gemello, J.